Supreme Court, U.S.
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No. *86-1734*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ARKANSAS.....*PETITIONER*

VS.

NORMA FOSTER.....*RESPONDENT*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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STATEMENT OF THE CASE

In her first trial, Respondent was convicted of first degree murder. However, this conviction was reversed and remanded for a new trial by the Arkansas Supreme Court. *See Foster v. State,* 285 Ark. 363, 687 S.W.2d 829 (1985). Respondent's second trial resulted in a mistrial. *See Foster v. State,* 290 Ark. 495, 720 S.W.2d 712 (1986). The state obtained a conviction in Respondent's third trial, but that conviction was reversed, and the case dismissed, by the Arkansas Supreme Court. *See Foster v. State,* 290 Ark. 495, 720 S.W.2d 712 (1986), *reh. den.*, 290 Ark. 498-A, 722 S.W.2d 869 (1987). The court held that since corroboration of accomplice testimony was required by statute (Ark. Stat. Ann. § 43-2116 (repl. 1977)) and such corroboration was lacking in this case, *as a matter of Arkansas law,* the Prosecution's case was insufficient to support a conviction. The court then dismissed the charge.

The state then petitioned for a rehearing, contending that a new trial should have been ordered rather than a dismissal of the charge. The Arkansas Supreme Court held:

> Thus, it is clear to us that if the United States Supreme Court were reviewing the case before us now, it would hold, as we now hold, that if under *our* law an accused must be acquitted if the state's case is based on the uncorroborated testimony of an accomplice, then that determination on appeal prohibits retrial just as it does when acquittal occurs at the trial. The reason for reversal is not 'error' but insufficiency of the state's proof. 290 Ark. 498-A, 498-B, 722 S.W.2d 869, 871, (1987). [Emphasis added.]

The Petitioner simply disagrees with the Arkansas Supreme Court's assessment of Arkansas law. The Petitioner now seeks to relitigate a purely state issue in the United States Supreme Court. The State of Arkansas failed, in three previous trials, to obtain a conviction that would withstand appellate scrutiny. The Petitioner now seeks an opportunity for a fourth bite at the apple. This Court should deny the Petition, based on the lack of a federal question to support the grant of a Writ of Certiorari.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court characterized failure to corroborate accomplice testimony pursuant to Ark. Stat. Ann. § 43-2116 as "insufficiency of proof," rather than "trial error." The Petitioner seeks to relitigate this state issue in this Court. Respondent submits that this issue is not properly cognizable by this Court through a Petition for Certiorari because no federal question has been decided by the Arkansas Supreme Court.

ARGUMENT

THIS COURT SHOULD DENY CERTIORARI BECAUSE NO FEDERAL QUESTION IS PRESENTED WHEN A STATE APPELLATE COURT REVERSES A CRIMINAL CONVICTION BECAUSE THE PROSECUTION FAILED TO CORROBORATE ITS ACCOMPLICE TESTIMONY AS REQUIRED BY STATE LAW.

Respondent has struggled in vain to see how this case, or Petitioner's argument, presents a federal question reviewable by this Court. Of course, Supreme Court Rule 17 sets forth the situations in which this Court will grant certiorari. Petitioner has not cited this rule anywhere in its Petition, so it is not clear why Petitioner believes that this Court should review this case. Petitioner may not have cited the rule because Petitioner's case does not fit within the "character of reasons" that this Court will consider.

Subsection (a) is inapplicable because it deals only with federal court decisions. Subsection (b) is inapplicable because the Arkansas Supreme Court decided no federal question, much less one in conflict with other state courts. The decision of the Arkansas Supreme Court is in accord with all state courts that have considered the issue. *See Matter of J.R.R.*, 696 S.W.2d 382 (Tex. 1985); *Caldwell v. State*, 418 So.2d 168 (Ala. 1981); *State v. Warren*, 628 P.2d 292 (Mont. 1981); *Erman v. State*, 49 Md.App. 605, 434 A.2d 1030 (1981), *cert. den.* 456 U.S. 908 (1982). No Federal Court of Appeals has decided the issue. Subsection (c) is inapplicable because, as will be explained below, the Arkansas Supreme Court simply did not decide a federal question.

The Arkansas Supreme Court merely decided a question of state law (construction of a state statute) and then applied well-established federal law to the set of facts that it found. Just because federal law was somehow involved in the ultimate disposition of the case does not mean that a federal question was decided. Presumably, under Petitioner's reasoning, every time federal law is involved in a case

a federal question is presented. This reasoning would lead to absurd results. For example, every criminal case would present a federal question, since they all apply the constitutionally mandated "reasonable doubt standard."

In Petitioner's Statement of the Case (*See* Petition, p. 4.), Petitioner attempts to state the federal question, although it does not state why this Court should hear the case. Petitioner states:

> The Arkansas Supreme Court's elevation of Foster's Fourteenth Amendment Due Process right over Arkansas' Tenth Amendment right presents the federal question that is necessary in order for this Court to exercise its statutory jurisdiction by means of Writ of Certiorari. Petition, p. 4.

However, Petitioner never again discusses the Tenth Amendment. Petitioner also does not explain why the protection of the Tenth Amendment inures only to the prosecutorial function of the state, and not to either the judicial or legislative branches of the state, so as to protect the promulgation and interpretation of Ark. Stat. Ann. § 43-2116.

While the Arkansas Supreme Court did rely on *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978) in making its determination to dismiss, as opposed to a new trial, that fact does not turn this case into a federal question ripe for review by this Court. The Arkansas Supreme Court only applied *Burks* and *Greene* after making an initial determination of state law. The Petitioner is actually disputing that initial determination of state law. The Petitioner concedes this in the very first paragraph of the Argument portion of its Petition, where it states:

> The exact point at which the Arkansas Supreme Court falls into error in its application of the Due Process Clause of the Fourteenth Amendment as interpreted in *Burks* and *Greene* is its failure to correctly characterize 'failure to corroborate accomplice testimony' as a 'trial error,' . . . Petition, p. 5.

Whether the Arkansas Supreme Court "correctly" determined that, as a matter of state law, failure to corroborate is, or is not, trial error is irrelevant to the present Petition. It is an issue of state law, on which that court is the final arbiter.

Petitioner attempts to bootstrap its argument into a constitutional issue by saying that the Arkansas Supreme Court held "that *Burks* and *Greene* require dismissal if the prosecution fails to corroborate its accomplice testimony." *See* Petition, p. 5. Of course, neither *Burks* nor *Greene* involved accomplice testimony. What they did involve is simply a process to be utilized in determining the applicability of the double jeopardy provision of the Constitution.

In the instant case, the Arkansas Supreme Court made its determination on the question of state law. Whether double jeopardy bars a re-trial depends on the court's decision that a failure to corroborate accomplice testimony has resulted in insufficiency of the the evidence. That is purely a matter of state law. To illustrate, if the court had determined that failure to corroborate accomplice testimony resulted in "trial error", as Petitioner contends, re-trial would not be barred by double jeopardy. The real battleground occurs in the initial determination, on the construction of state law.

This analysis was confirmed by this Court in the *Burks* decision. In *Burks*, a unanimous Court (Justice Blackmun not participating) held that "the Double Jeopardy Clause precludes a second trial *once the reviewing Court has found the evidence legally insufficient*[;] the only 'just' remedy available for that Court is the direction of a judgment of acquittal." 437 U.S. at 18. [Emphasis added.] The language emphasized above clearly dictates the result once a Court makes a determination concerning the proper characterization of the error. This is what the Arkansas Supreme Court did. Once it found the evidence legally insufficient, "the only just remedy" was to dismiss the charge.

Burks was not construed, analyzed, or interpreted; it was merely applied to the facts by Arkansas' highest Court, in much the same way as *In re Winship* is not construed, analyzed, or interpreted every

time the reasonable doubt standard is applied to a set of facts. Neither situation involves a decision as to a federal question.

While Respondent does not believe that the Arkansas Supreme Court's determination of the effect of certain evidence in its own Courts is properly reviewable by this Court, Respondent found no cases, and none were cited by Petitioner, which hold that failure to corroborate accomplice testimony, as required by statute, results in "trial error" rather than "insufficiency of proof." Of the state courts that have considered the question, all have determined that failure to corroborate accomplice testimony results in insufficiency of evidence. After making that determination, those courts proceeded to hold that a new trial would result in double jeopardy, and that *Burks* and *Greene then* require dismissal of the charge. *See Matter of J.R.R.*, 696 S.W.2d 382 (Tex. 1985); *Caldwell v. State*, 418 So.2d 168 (Ala. 1981); *State v. Warren*, 628 P.2d 292 (Mont. 1981); *Erman v. State*, 49 Md.App. 605, 434 A.2d 1030 (1981) *cert. den.* 456 U.S. 908 (1982). Other cases decided before *Burks* also indicate that failure to corroborate accomplice testimony results in insufficiency of the evidence which leads to dismissal of the charge. *See Rutledge v. State*, 507 P.2d 551 (Okla. 1973). Certainly, there is no confusion or disagreement among the states as to the effect of uncorroborated accomplice testimony.

The Petitioner appears to argue that the *Burks* rule only applies when the insufficiency of the evidence results from a failure to meet the reasonable doubt standard, rather than a burden imposed by the state legislature, such as the statute involved here. Although incorrect, this is an interesting analysis.

The reasonable doubt standard was found to have constitutional support in *In re Winship*, 397 U.S. 358 (1970). There it was stated, "[w]e explicitly hold that the Due Process Clause *protects the accused* against conviction except upon proof beyond a reasonable doubt . . ." *Id.* at 364. [Emphasis added.] Quite clearly, the reasonable doubt standard was intended to act as a shield for the accused. However, the Petitioner would invert the reasoning of *In re Winship* and use the reasonable doubt standard as a

sword. The Petitioner argues that, unless the evidence is insufficient to convict beyond a reasonable doubt, that constitutional standard may be used by the state to avoid the application of a separate constitutional guarantee.

Under Petitioner's inverted perception of constitutional law, a state could never provide any greater protection for an accused than that prescribed by the Constitution. This is not the law. Writing for the majority, Justice O'Connor stated in *California v. Ramos*, 463 U. S. 992 (1983):

> It is elementary that states are free to provide greater protections in their criminal justice system than the federal Constitution requires. We sit as judges, not as legislators . . . *Id.* at 1013-14.

The reasonable doubt standard (as with other constitutional protections) stands merely as an outer limit beyond which a state may not tread. It says that a state may not convict on less than reasonable doubt. It does not say that a state may not establish other requirements in addition to the reasonable doubt standard to convict one of its citizens.

CONCLUSION

The decision of the Arkansas Supreme Court in *Foster v. State*, 290 Ark. 495, 720 S.W.2d 712 (1986) *reh. den.*, 290 Ark. 498-A, 722 S.W.2d 869 (1987) presents no federal question that is reviewable by this Court. Respondent respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted:

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